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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/561,946

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Seiji Hosokawa

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EXAMINER

GWARTNEY, ELIZABETH A

ART UNIT

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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/561,946	<b>Applicant(s)</b> HOSOKAWA, SEIJI	
	<b>Examiner</b> Elizabeth Gwartney	<b>Art Unit</b> 1794	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-17 is/are pending in the application.  
     4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-17 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
     Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
     Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
     a) ☒ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)            | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | Paper No(s)/Mail Date. ____.                                      |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>20051221</u> .  | 6) <input type="checkbox"/> Other: ____.                          |

## **DETAILED ACTION**

### ***Claim Rejections - 35 USC § 112***

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

2. Claims 1-17 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Regarding claims 1 and 16, the recitation "does not *substantially* include active gluten" renders the claim indefinite because it is not clear what "substantially" means or what amount of gluten, if any, is encompassed by the term.

### ***Claim Rejections - 35 USC § 102***

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

4. Claims 1-4, 7-8, 10, 13-17 is rejected under 35 U.S.C. 102(b) as being anticipated by Hosokawa (JP 2001-275552 – Patent Abstract and Machine Translation).

Regarding claim 1, Hosokawa discloses a hollow stick-like pretzel obtained by baking dough, extruded to have a hollow stick shape, containing a pregelatinized wheat flour (i.e. cereal flour) and cornmeal (Abstract, [0014], [0019], [0072]).

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Since the non-gelatinized flour, cornmeal (i.e. corn flour) disclosed by Hosokawa is identical to that presently claimed, it is clear that it would inherently be free of active gluten. Further, given that Hosokawa disclose a gelatinized wheat starch identical to that presently claimed, it is clear that it would inherently not include active gluten.

Regarding claim 2, Hosokawa discloses all of the claim limitations as set forth above. Given that Hosokawa disclose a baked hollow stick shaped snack, obtained from a dough including gelatinized flour and non-gelatinized flour that does not contain gluten, identical to that presently claimed, it is clear that the baked snack would inherently have a moisture content of 5 weight % or less.

Regarding claims 3-4, Hosokawa discloses all of the claim limitations as set forth above. Further, Hosokawa discloses that the weight ratio of non-gelatinized flour (i.e. corn meal) to gelatinized flour ranges from about 67:43 to about 1:99 (see 100 parts cornmeal and 1-50 parts gelatinized flour).

Regarding claims 7-8, Hosokawa discloses all of the claim limitations as set forth above and that the gelatinized flour includes wheat flour (i.e. cereal flour - Abstract).

Regarding claim 10, Hosokawa discloses all of the claim limitations as set forth above and that the dough includes: about 1 to about 67 parts by weight of sugars (i.e. saccharides) and about 1 to 33 parts by weight of oils and fat with respect to a total 100 parts by weight of the non-gelatinized flour and the gelatinized flour (*note*: Hosokawa discloses sugar and oil/fat with respect to 100 parts non-gelatinized flour or cornmeal, therefore, the quantities given above are adjusted to account for both the non-gelatinized flour and gelatinized flour - [0034]-[0038]).

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Regarding claims 13-14, Hosokawa discloses all of the claim limitations as set forth above and that the outer diameter of the baked snack is 15 mm or less ([0063]), and an inner diameter thereof is 40% or more of the outer diameter ([0064]. Further, Hosokawa discloses that the thickness of the baked snack is 2.5 mm or less in at least a part thereof ([0057]-[0061]).

Regarding claim 15, Hosokawa discloses all of the claim limitations as set forth above and that the inside of the hollow stick shaped baked snack is filled with a gustatory agent (i.e. filling material ([0074]-[0076], [0091], [0108]).

Regarding claims 16-17, Hosokawa discloses a method of making a baked snack comprising the steps of: (a) mixing non-gelatinized flour (i.e. cornmeal/corn flour) and gelatinized flour to obtain a mixed dough ([0044]); ((b) extruding the mixed dough via a nozzle into a hollow stick shape to obtain a shaped dough ([0046]-[0048]); and (c) baking the shaped dough to obtain the baked snack having the hollow stick shape (*see* calcination [0014], [0072]). Further, Hosokawa discloses a step of injecting a gustatory agent (i.e. filling material) into the inside of the hollow stick shaped baked snack via an open end of the baked snack ([0074]-[0076]).

### ***Claim Rejections - 35 USC § 103***

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

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6. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

7. Claims 11-12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hosokawa (JP 2001-275552 – Patent Abstract and Machine Translation).

Regarding claim 11, Hosokawa discloses all of the claim limitations as set forth above. While Hosokawa discloses sub-materials (i.e. taste providing material) including egg, salt, spice, and chemical seasoning ([0043]), the reference does not explicitly disclose a baked snack with 10 to 30 parts by weight of taste providing material with respect to the total 100 parts by weight of non-gelatinized flour and the gelatinized flour. As flavor intensity and character are variables that can be modified, among others, by adjusting the amount of taste providing material in the dough composition, the precise amount of taste providing material would have been considered a result effective variable by one of ordinary skill in the art at the time of the invention. As such, without showing unexpected results, the claimed amount of taste providing material cannot be considered critical. Accordingly, one of ordinary skill in the art at the time the invention was made would have optimized, by routine experimentation, the amount of taste providing material in the dough composition of Hosokawa to obtain the desired flavor character and intensity in the baked snack (*In re Boesch*, 617 F.2d. 272, 205 USPQ 215 (CCPA 1980)), since it has been held

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that where the general conditions of the claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. (*In re Aller*, 105 USPQ 223).

Regarding claim 12, Hosokawa discloses all of the claim limitations as set forth above. Given that Hosokawa disclose sub-materials (i.e. taste providing materials) broadly, it would have been obvious to one of ordinary skill in the art at the time of the invention to have chosen a sub-material , based on flavor preferences, including cocoa powder, and arrive at the current invention.

8. Claims 5-6 and 9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hosokawa (JP 2001-275552 – Patent Abstract and Machine Translation) in view of Hiroko (JP 09-149757 – Abstract only).

Regarding claims 5-6 and 9, Hosokawa discloses all of the claim limitations as set forth above. While Hosokawa discloses a non-gelatinized flour free of active gluten (i.e. cornmeal) and a gelatinized wheat flour, the reference does not explicitly disclose that the non-gelatinized flour is derived from wheat including a roasted wheat flour.

Hiroko teaches a biscuit dough comprising wheat flour and a roasted wheat flour (Abstract). Hiroko teaches that the roasted wheat flour gives the biscuit good solubility in the mouth and crispy texture (Abstract).

Hosokawa and Hiroko are combinable because they are concerned with the same field of endeavor, namely, baked snack food comprising a wheat component. It would have been obvious to one of ordinary skill in the art at the time of the invention to have used roasted wheat flour, as taught by Hiroko, as the non-gelatinized flour in the dough of Hosokawa for the

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purpose of making a product with good solubility in the mouth and crispy texture. Further, since Hiroko teaches a wheat flour free of gluten (i.e. roasted wheat flour), using roasted wheat flour would amount to nothing more than the use of a known flour free of gluten activity for its intended use in a known environment to accomplish entirely expected results.

9. Claims 1-2, 5 and 7-8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Michiko et al. (JP 11-276058 – Patent Abstract and Machine Translation).

10. Regarding claim 1, Michiko et al. discloses a baked food (i.e. cake, biscuit, bread, buns - Abstract) obtained from a dough that comprises an non-gelatinized wheat flour and a gelatinized wheat flour wherein the flour contains no gluten (*see* using wheat flour containing non gluten as a raw material and gelatinizing **a part** of the wheat flour – Abstract).

Michiko et al. fails to disclose that the baked snack has a hollow stick shape and a moisture content of 5 weight % or less.

While Michiko et al. does not explicitly disclose a baked snack having a hollow stick shape, change in size and shape is not patently distinct over the prior art absent persuasive evidence that the particular configuration of the claimed invention is significant. See *In re Rose*, 220 F.2d 459, 105 USPQ 237 (CCPA 1955); *In re Rinehart*, 531 F.2d 1048, 189 USPQ 143 (CCPA 1976); *In re Dailey*, 357 F.2d 669, 149 USPQ 47 (CCPA 1966). MPEP 2144.04[R-1].

Regarding moisture content, given that Hosokawa disclose a baked hollow stick shaped snack, obtained from a dough including gelatinized flour and non-gelatinized flour that does no contain gluten, identical to that presently claimed, it is clear that the baked snack would inherently have a moisture content of 5 weight % or less.

***Conclusion***

10. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

-Saburo et al. (JP 60-083537) teach a molded and roasted composition comprising a gelatinized rice starch, starch, and fats/oils. Saburo et al. does not teach a baked product including sugars.

-Minoru et al. (JP 61-265049) teach a baked product composition comprising a pregelatinized raw starch material. Minoru et al. does not teach a composition including non-gelatinized flour free of gluten activity, fats and oils, or sugars.

-Naoko et al. (JP 04-131046) teach a hollow roasted cake comprising gelatinized starch and raw starch, fats and oils, and water. This reference is cumulative to Michiko et al.

11. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Elizabeth Gwartney whose telephone number is (571) 270-3874. The examiner can normally be reached on Monday - Thursday; 7:30AM - 5:00PM EST, working alternate Fridays.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Callie Shosho can be reached on (571) 272-1123. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/E. G./

Examiner, Art Unit 1794

/Callie E. Shosho/

Supervisory Patent Examiner, Art Unit 1794